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Opinion No. 57-112

REQUESTED BY: The Honorable Charles O. Blanquist

OPINION BY: ROBERT MORRISON
The Attorney General
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QUESTION: Can the City of Douglas appropriate tax money to install and maintain a translator TV system, if approved by a special election of the registered voters of the City?

CONCLUSION: Yes.

We have listed the lines of authority contrary to our opinion so that the cities which decide to act on the basis of this opinion may have full notice of the respectable authorities to the contrary so that they may be guided accordingly.

One preliminary point should be disposed of before continuing with the more important aspects of the question involved. TV installations and their operation have been considered in two opinions issued from this office. Opinion 54-59-L, of March 12, 1954, considered jurisdiction of the Corporation Commission concerning TV transmission and held that the Corporation Commission had no jurisdiction over such operation. Opinion No. 55-206, of October 18, 1955, concerned itself with the question: Does the Corporation Commission have jurisdiction over companies which transmit TV images by cable? And, it was the opinion of this office that no such jurisdiction over such companies existed. As shall be seen, neither of these opinions are pertinent to the question herein, for much of the answer to the immediate question shall depend on whether or not the installation and maintenance of a translator TV system is a public utility enterprise. It shall not be concerned with who has jurisdiction of a public utility enterprise, for, the immediate question: What is a public utility is not answered by a consideration of who has jurisdiction over the enterprise, whether it be a city itself, the federal government, the state government, or any combination of these governments, no matter who controls it, an enterprise may or may not be a public utility.

There are two salient questions involved herein:

1. Is the <u>form</u> of the contemplated enterprise authorized, and,

2. If so, is such enterprise for a public purpose?

AS TO FORM

The Arizona State Constitution, Article 2, Section 34, says:

> "The State of Arizona and each municipal corporation within the State of Arizona shall have the right to engage in industrial pursuits. Added election Nov. 5, 1912, eff. Dec. 5, 1912."

The form of enterprise a municipality may engage in is not limited. However, this constitutional section is not self-executed. City of Tucson vs. Polar Water Co., 76 Ariz. 126, 130, 259 P.2d 561, and City of Tucson vs. Polar Water Co., 76 Ariz. 404, 409, 265 P.2d 773. Therefore, the question becomes: Has the Legislature executed Article 2, Section 34, supra?

A.R.S. § 9-511, says:

> "Power to engage in business of public nature; right of eminent domain
>
> "A. A municipal corporation may engage in any business or enterprise which may be engaged in by persons by virtue of a franchise from the municipal corporation, and may construct, purchase, acquire, own and maintain within or without its corporate limits any such business or enterprise. A municipal corporation may also purchase, acquire and own real property for sites and rights of way for public utility and public park purposes, and for the location thereon of water works, electric and gas plants, municipal quarantine stations, garbage reduction plants, electric lines for the transmission of electricity, pipe lines for the transportation of oil, gas, water and sewage, and for plants for the manufacture of any material for public improvement purposes or public buildings.
>
> * * * * *"

It will be noticed that the above section puts into execution Article 2, Section 34, of the Arizona Constitution, and by way of form of enterprise, municipalities may engage in public utility pursuits. Therefore, the question becomes: Does the installation and maintenance of a municipal TV translator system constitute a public utility?

What is a public utility?

There is no statute in Arizona defining public utility. Public service corporations are enumerated, however. Article 15, Section 2 of the Arizona Constitution, A.R.S. § 40-201. See also, Article 15, Section 10, of the Arizona Constitution. Article 15, Section 2, supra, thereof, entitled "'Public service corporations' defined" is not a true definition. It is actually a list of enterprises, other than municipal, deemed public service corporations. As shall be seen, its usefulness for the instant problem is in giving examples of what might or might not be considered public utilities by this State. What is a public utility, still is a question of fact despite such a list of examples as is found in Article 15, Section 2, supra, or in any statute. Said question of fact depends in every instance upon certain principles, which the Court will look at. See 73 C.J.S., Public Utilities, Sections 1 and 2. There are many aspects of operations and organization which a court will view. First of all, the courts will take a general look at the use and devotion of the operation of the enterprise to the public generally. Such use and service must be something which the public can expect to be conducted with reasonable efficiency and charges, and which the public generally, but not necessarily in absolute majority, may demand. It is what is often termed "a business effected with a public interest". 73 C.J.S., op.cit. Notice the enumeration of some of the general facts a court will view in Natural Gas Service Co. vs. Serv-Yu Cooperative, Inc., 70 Ariz. 235, 219 P.2d 324, 327, and this case is in part excellent authority for the statements in this paragraph. However, what do the cases show concerning this exact problem, to-wit: Whether or not such TV transmittal enterprises are of a public utility nature?

All of the recent cases coming to the attention of this office, which attempted to determine whether or not a TV translator tower and equipment were public utility, have arisen under an effort to bring them under the jurisdiction and control of the local public utilities commission (e.g., in Arizona, the Corporation Commission). In Re Edwin Francis Bennett (Wisc.), 89 P.U.R., N.S. 149, it was stated that parallel jurisdiction by both state and federal government precluded state regulation for such enterprise. Therefore, a true consideration of whether or not the enterprise were a public utility was not made. (This exact situation could not have arisen in Arizona wherein municipal utilities are exempted from the Corporation Commission's jurisdiction.) In Re Cokevill Radio & Electric Co. (Wyo.) 6 P.U.R. 3rd 129, such an enterprise was held to be a public utility. Wyoming, however, had a statute which stated that when a person or municipality furnished a facility to

or for the public, which is "for the transmission of intelligence by electricity" such operation would be deemed a public utility. This report criticized the Wisconsin decision, supra, stating that although the Federal Government could enter the field, it had not entered into the regulation of the TV translators. The result was the states were still able to regulate them until such time as the Federal Government entered into such regulation. In Television Transmission, Inc. vs. Public Utilities Comm. (Cal.), 301 P.2d 869, the present situation arose concerning a community TV antenna, and since the California Court could not find such operation under their specific public utilities code sections concerning electric corporations, electric plants, telegraph corporations, telephone corporations, or telephone lines, the California Court denied the California Public Utilities Commission jurisdiction over such antenna. In Ohio Tel. & Tel. Co. vs. Steen, 54 Ohio L.Abs. 114, 85 N.E.2d 579, circuit lines and cables constructed for television purposes were installed by the Telephone Company. The Court held since TV transmission was merely an advancement of telegraphy, and telephony, rights of eminent domain conferred by statute relative to these endeavors were applicable to a telephone company constructing circuit lines and cables for television use. Note: The importance of this case is: (a) Its likening television to telephony and telegraphy, and (b) Its inference, despite the rule that a public utility not always acts in a public utility capacity, that construction of television circuit lines and cables to serve the population of a local area was a public utility activity. See also 15 A.L.R. 2d 785. There are other cases concerning this subject, citations to which may be gained from a reading of the above cases, but they do not add to the discussion of the problem involved.

We wish to emphasize the basic law involved.

What constitutes a public utility does not depend alone upon granting or refusal of jurisdiction over said utility by the local utilities division, nor any specific government, nor does it depend alone upon the nature of the business rendered, nor the declaration of an individual that he is serving the public in general, nor can the legislature by mere fiat or regulatory order declare a private business a public utility or a public utility a private business. Despite the comments of some of the cases just discussed, this is to reaffirm the basic law that it is a question of fact opinion always to be determined by the judiciary. See State Public Utilities Commission vs. Monarch Refrigerating Co., 267 Ill. 528, 108 N.E. 716; Clear Creek Oil & Gas Co. vs. Fort Smith Smelter Co., 148 Ark. 260 230 S.W. 897; 73 C.J.S. op. cit. and Natural Gas Service Co. vs. Serv-Yu Cooperative, supra. Looking specifically at some of the

ultimate facts which, when answered affirmatively, would show this enterprise to be a public utility:

Is the proposed translator dedicated to a public use? Natural Gas Service Co. v. Serv-Yu Cooperative, supra; the facts govern the answer. Rural Electric Co. vs. State Board of Equalization, 57 Wyo. 451, 120 P.2d 741, 747, rehearing denied 122 P.2d 189. The answer appears to be, yes. It may well be noted that the use of the commodity or installation by the private individuals served is not of importance; e.g., a carrier may be used to carry toys or penicillen by the individuals, a gas jet may be used to make fudge or heat a school room. If this were not the law, then public utility activities would only be those concerned with courthouses, schools, etc. Clarksburg Light & Heat Co. vs. Pub. Serv. Comm., 84 W.Va. 638, 100 S.E.551, 554. Whether the images seen from the translator's use are educational or mere entertainment should make no difference under this rule. The question remains, is the proposed translator dedicated to a public use.

Will the translator be ready to supply its product (sound and images, i.e., intelligence) to the public as a class and not only particular individuals? 51 C.J.5. This may be shown by implication and other factors. Keystone Warehousing Co. vs. Public Service Comm., 105 Pa. Super. 267, 161 A. 891, 892. The answer appears to be, yes.

Will its rates (methods of financing in this case), charges and methods of operations be a matter of public concern, welfare and interest? Clarksburg Light & Heat Co. vs. Pub. Serv. Comm., supra. The financing will be through tax monies, the charges and operations will be made by the people's municipal government, and the answer to this question is, yes. As to public interest, this factor is taken up separately hereafter in this opinion.

Will it monopolize the territory with the service of a commodity with which the public is generally held to have an interest? (A total monopoly is not an ultimate criterion, it is merely another factor to consider.) Natural Gas Service Co. vs. Serv-Yu Cooperative, Inc., supra; Valcour vs. Village of Morrisville, 110 Vt. 93, 2 A.2d 312, 315; Munn vs. Illinois, 94 U.S. 113, 126, 24 L.Ed. 77. The answer is based on facts not at hand, but, it is apparently, yes; as to whether the public has an interest, the answer shall be seen further in this opinion.

Will it serve all in the area who request such service? Consolidation Coal Co. vs. Martin, 8th Cir., 113 F.2d 813, 817. Clarksburg Light & Heat Co. vs. Pub. Serv.Comm., supra, 554; and

Rural Elec. Co. v. State Board of Equalization, supra, 748. The answer apparently, is yes.

Will it actually or potentially compete with other corporations whose business is clothed with a public interest? Indust. Gas Co. vs. Public Utilities Comm. of Ohio, 135 Ohio St. 408, 21 N.E. 2d 166, 168. The answer is, yes. This is one of the reasons the Federal Government controls airwaves, etc. See the discussions in the texts quoted hereafter when public interest is discussed.

Therefore, do we conclude that under the facts peculiar to this opinion, the translator, the City of Douglas, wishes to install may well be cloaked with enough of the indices of a public utility to be a public utility, except, perhaps, the question of whether or not it is a business affected with a public interest. Natural Gas Service Co. vs. Serv-Yu Cooperative, supra, and the other cases quoted above. For, although it is obvious that not all businesses affected with a public interest may be public utilities, nevertheless, all public utilities are businesses affected with a public interest.

Is the installation and maintenance of a community TV translator system a business affected with a public interest? In particular creamery businesses in North Dakota, insurance businesses in Texas, title insurance and tobacco dealers in California, selling milk in Alabama, barber services in Louisiana, employment agents in New York have been held businesses affected with a public interest, as well as the usual common carriers, telephone companies, etc. 5 Words and Phrases, 1018.

However, several rules of thumb arise which may well determine this problem. One question to look at is:

Is the enterprise such as would fall under the exercise of police power, regulation and control? Taken alone, largeness of the business is no concern, whether or not it is franchised is no concern, whether or not the public has simply an interest qua an interest in the business is of no concern, nor is the fact that the public derives a benefit, of concern. It must be such a business as to justify a conclusion that it has been devoted to a public use and is in fact granted to the public; Southwestern Utility Ice Co. vs. Liebmann (Okla.), 52 F.2d 349, 354, and, it should be such that control over it is exercised in order to protect the people and in order to promote their general welfare, Board of Insurance Commissioners vs. Kansas City Title Insurance Co. (Tex.), 217 S.W.2d 695, 698. Radio and television have long been recognized as enterprises

so influential on public business, education, culture, thought and morals, that various controls in this regard have long been in effect and, regardless of who controls them, the industries themselves, the Federal Government, state or local governments, the requisite public interest is present. It is interesting to read the texts and the authorities in this regard. Warner, Harry P., Radio and Television Law, Sections 104C, page 810 and 104Z, pages 872-3 has pointed to the historical tendency to regulate radio and television under a public utility concept. The "facilities for candidates for public office", Section 315(a), Federal Communications Acts, amended 1952, is an example of the effect of this medium on the minds of the public and their democracy. Title 1, Section 1, of the above Act, as amended, states categorically its purpose:

> "...to make available, so far as possible, to all the people of the United States a rapid, efficient, Nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property, through the use of radio and wire communication ..." (Emphasis Supplied)

As all the authorities point out, LeRoy, Howard S., Aeronautical and Radio Law, page 10, being one in particular, the importance of this enterprise to the public has brought it under federal or state government monopolies in every European country. And, whereas, radio and television are in the United States traditionally privately operated, we have since 1912 recognized the need of adequate protection of "the public interest". Dr. W. Jefferson Davis in his work entitled Radio Law has, in his recognized, expressive use of the English language and historical insight, well stated the "financial and commercial significance" in radio, the use of such communications as "an indispensable instrument for the transmission of news," its "cultural factor of tremendaus (sic) significance", that it "figures heavily in the equation of democracy", that

> "...radio telephony...completely changed the habits of entire nations. Countless millions now depend upon radio not only for education and instruction, but for amusement, entertainment and relaxation."

And, further, it is a

> "...communication through which the intelligence of the nation will find expression, and commercial intercourse flow unimpeded from the transmitting stations in our great centers of population outward in every direction to the outlying communities."

Thus comes his and all other authorities' inescapable conclusion that "law makers would be foolish to forget for a moment that the people themselves must be first parties in interest in whatever is done."

Therefore, it appears that where a community TV translator system, such as contemplated by the City of Douglas, is installed, it is manifestly a business cloaked with a public interest, both in terms of its operation, commodity and expense. Therefore, it may well be concluded as we have concluded above as to the primary question involved in this opinion that, the construction and operation of a TV translator system installed by a municipality for purposes of use by a municipality for its people in general is a public utility, and as such enterprise it is authorized by A.R.S. § 9-511. However, proprietary enterprise as well as governmental should be clothed with a public purpose. 37 Am.Jur., Municipal Corporations, Section 114, P. 727.

AS TO PUBLIC PURPOSE

Therefore, do we come to the second salient question involved herein. In this regard the Arizona Supreme Court has said in City of Tombstone vs. Macia, 30 Ariz. 218, 228:

> "...Generally speaking, anything calculated to promote the education, the recreation, or the pleasure of the public is to be included within the legitimate domain of public purposes, and on this ground it has even been held that authority to erect and conduct an opera house may be conferred upon a municipal corporation." (Emphasis supplied)

And, further, in Schwartz vs. Jordan, Arizona Supreme Court Docket No. 6433, dated May 14, 1957, the Supreme Court said:

> "We further observed that whether a purpose is a 'public purpose' is determined in each particular case from all the facts and circumstances. A 'public purpose' has for one of its objectives the

promotion of the public health, safety, morals, general welfare, security, prosperity and contentment of public employees or officers who are exercising the sovereign powers of the state in the promotion of public purposes or public business."
(Emphasis supplied)

In Opinion No. 57-84 released from this office June 13, 1957, it was said concerning a further Arizona Supreme Court pronouncement of public purpose:

"Our Supreme Court has been very liberal in construing the term 'public purpose'. In the case of City of Glendale vs. White, 67 Ariz. 231, 194 P.2d 435, our Supreme Court, in effect, held that whether the performance of an act or the accomplishment of a specific purpose constitutes a 'public purpose' for which public funds may be lawfully disbursed, and the method by which such action is to be performed or purpose accomplished, rests in the judgment of the body authorized to make such decision. The Court held that the judicial branch will not presume to substitute its judgment for that of such body unless latter's exercise of judgment or discretion is shown to have been unquestionably abused. ..." (Emphasis supplied)

With the people themselves exercising their democratic choice, voting and approving or disapproving the enterprise in question, no more equitable method in determining public purpose under the above cases could be used.

Therefore, the right to engage in such an enterprise being established as to the form of such enterprise, it may well be further concluded that under the above-cited opinions of the Arizona Supreme Court concerning what constitutes "public purpose", no objection as to the installation and maintenance of a translator TV system because of "public purpose" can be raised.

However, under the rule heretofore stated that each situation is determined by its own peculiar facts, the discussion in this opinion should be limited to the peculiar circumstances herein and not applied to privately financed enterprises or to counties engaging or attempting to engage in such enterprises. No attempt has been made herein to consider such instances.

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